

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 16, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP212

Cir. Ct. No. 2013CV824

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

ADAM M. BERGER AND CHRISTINA C. BERGER,

PLAINTIFFS-RESPONDENTS,

V.

HERB G. SCHROEDER & SONS, INC. AND THOMAS ROBERT SCHROEDER,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Waukesha County:
PATRICK C. HAUGHNEY, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Stark, J.

¶1 PER CURIAM. Herb G. Schroeder & Sons, Inc. and Thomas Robert Schroeder (Schroeder) appeal from a judgment entered against them after a

jury determined that they were liable to Adam and Christina Berger in relation to home improvement work.¹ We affirm the judgment.

¶2 Schroeder performed home improvement work on the Bergers' home. The Bergers sued Schroeder for breach of contract, theft by contractor, slander of title arising from Schroeder's filing of a construction lien against the Bergers' home, and violation of consumer protection laws. The Bergers sought actual and punitive damages and actual attorney's fees. Schroeder counterclaimed for breach of contract, unjust enrichment and foreclosure of the construction lien.

¶3 The jury found that Schroeder breached the contract, but the Bergers did not. The jury also found that (1) Schroeder made false, deceptive, or misleading representations to induce the Bergers to enter a home improvement contract; (2) the home improvement contract failed to clearly, accurately and legibly set forth a description of the work to be done and the products to be used; (3) the home improvement contract failed to clearly, accurately and legibly set forth the total price or other consideration to be paid by the Bergers for the project; (4) the home improvement contract failed to clearly, accurately and legibly set forth any documents incorporated into the contract; (5) Schroeder misrepresented the amount owed by the Bergers under the home improvement contract; and (6) Schroeder made changes to the home improvement contract which were not reduced to writing. The Bergers paid Schroeder \$60,000 for the work, but the jury found that the value of the work performed by Schroeder was \$59,000, leading to

¹ The parties' briefs violate the Rules of Appellate Procedure because the briefs refer to the parties by party designation. WIS. STAT. RULE 809.19(1)(i) (2013-14). Future briefs filed in this court must comply with the Rules of Appellate Procedure. All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

a damage award to the Bergers of \$1000. The circuit court also awarded the Bergers \$1000 in punitive damages and \$45,044 in attorney's fees.

¶4 Posttrial, the parties disputed the Bergers' request for attorney's fees. The Bergers' counsel informed the court that the firm had taken the Bergers' case pro bono. The court found that the Bergers' counsel's hourly rate was reasonable.

¶5 In relation to the reasonableness of the attorney's fees sought, the circuit court found that Schroeder's conduct in connection with the home improvement project was outrageous. Schroeder should not have filed a \$13,948 construction lien against the Bergers' home because, as the jury found, the Bergers and Schroeder never came to an agreement on the work to be done and the price to be paid. The Bergers had to bring an action to challenge the construction lien Schroeder filed against their home. While the jury only awarded the Bergers \$1000 in damages, the value of the Bergers' case included vacating the \$13,948 construction lien for a home improvement debt they did not owe. The court found that the presumption regarding attorney's fees set out in WIS. STAT. § 814.045 did not apply and awarded \$45,044 in attorney's fees requested by the Bergers.

¶6 On appeal, Schroeder argues that because the damages in the case were \$1000, fees in the amount of \$45,044 were excessive under WIS. STAT. § 814.045(2)(a). Schroeder argues that the circuit court should have applied the presumption of § 814.045(2)(a) that in cases where "compensatory damages are awarded, the court shall presume that reasonable attorney fees do not exceed 3 times the amount of compensatory damages awarded." However, "this

presumption may be overcome if the court determines, after considering the factors ... in sub. (1), that a greater amount is reasonable.”² *Id.*

¶7 When reviewing an award of attorney’s fees and costs, we will not overturn the circuit court’s decision unless there was an erroneous exercise of discretion. *See Hughes v. Chrysler Motors Corp.*, 197 Wis. 2d 973, 987, 542 N.W.2d 148 (1996). Discretion is properly exercised if the court “employs a logical rationale based on the appropriate legal principles and facts of record.” *Id.* (citation omitted).

¶8 A circuit court considering a request for attorney’s fees under WIS. STAT. § 814.045 may consider: the amount of damages, § 814.045(1)(f); the results obtained in the action, § 814.045(1)(g); the legitimacy or strength of defenses asserted in the action, § 814.045(1)(n); and other factors the court deems important or necessary to consider under the circumstances of the case, § 814.045(1)(p). In this case, the circuit court viewed the Bergers’ compensatory damages as enhanced by the value of the construction lien they successfully challenged, a lien the circuit court found was part and parcel of Schroeder’s outrageous conduct. The court clearly considered the § 814.045(1) factors and implicitly determined that the statutory presumption was overcome. Furthermore, when the amount of the construction lien and the damages awarded by the jury are considered together (\$14,948), the \$45,044 in attorney’s fees was appropriate under § 814.045(2)(a) (reasonable attorney’s fees calculated at three times the amount of the compensatory damages). We conclude that the circuit court

² Schroeder does not dispute that attorney’s fees were awardable.

properly exercised its discretion in awarding the Bergers \$45,044 in attorney's fees.

¶9 Schroeder raises other challenges to the award of attorney's fees. Schroeder argues that the Bergers did not have a fee agreement with their counsel, as the Bergers' counsel took their case pro bono. However, attorneys working under such an arrangement may recover attorney's fees. *Shands v. Castrovinci*, 115 Wis. 2d 352, 361, 340 N.W.2d 506 (1983) (attorney's fees award may go to attorneys who did not charge legal fees to the client). Attorneys working pro bono "should be compensated at the same rate as similarly situated private attorneys engaging in the same type of representation." *Id.* at 362. We are not persuaded that attorney's fees could not be awarded to the Bergers' counsel.

¶10 Schroeder argues that attorney's fees cannot be awarded for unsuccessful legal work. We disagree. Attorney's fees are not reduced for time spent on unsuccessful claims if the winning party was substantially successful and the unsuccessful claims were made in good faith. *Radford v. J.J.B. Enters., Ltd.*, 163 Wis. 2d 534, 550, 472 N.W.2d 790 (Ct. App. 1991). The Bergers substantially prevailed in the case, and there is no indication that they made their claims in less than good faith. No reduction in fees was warranted.

¶11 We turn to Schroeder's challenges to various evidentiary rulings. Schroeder complains that the testimony of one of the Bergers' experts, Kevin Wahlgren, should have been excluded because his opinions were

unsupported, did not meet the requisite standard for expert opinions³ and were contrary to the facts of the case. As Schroeder argues the issue to us, we cannot tell if Schroeder raised these objections pretrial or during trial. “The party raising the issue on appeal has the burden of establishing, by reference to the record, that the issue was raised before the circuit court.” *State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). We will not cull the record to determine if Schroeder preserved this issue for appeal. *Mogged v. Mogged*, 2000 WI App 39, ¶19, 233 Wis. 2d 90, 607 N.W.2d 662. We will not decide an issue raised for the first time on appeal. *Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).⁴ Additionally, Schroeder’s argument that Wahlgren’s opinions did not meet the requisite standard is not adequately briefed, another reason we will not consider it. *Vesely v. Security First Nat’l Bank*, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985).⁵

¶12 Schroeder next challenges the circuit court’s admission of Christina Berger’s testimony about her health issues.⁶ At trial, both of the Bergers testified about Christina’s health issues to explain why, during the time Schroeder

³ Magic words are not required to express the degree of certainty required of an expert opinion if a reasonable interpretation of the expert’s testimony demonstrates that the expert was expressing an expert opinion. *Drexler v. All Am. Life & Cas. Co.*, 72 Wis. 2d 420, 432, 241 N.W.2d 401 (1976).

⁴ We observe that Schroeder’s challenge to the adequacy of Wahlgren’s opinions is the type of challenge addressed via cross-examination, not via exclusion of the opinions.

⁵ The Bergers’ brief provides us with the circuit court’s discretionary ruling on the admissibility of Wahlgren’s opinions; Schroeder’s brief does not discuss the court’s ruling.

⁶ Schroeder’s additional argument that Christina Berger’s testimony about her health conditions was unfairly prejudicial under WIS. STAT. § 904.03 is undeveloped, and we will not address it. *Vesely v. Security First Nat’l Bank*, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985).

worked on the home (1) they were away from their home for prolonged periods obtaining medical care for Christina; (2) Christina, who was employed full-time outside the home, spent prolonged periods in the home while Schroeder either worked on the home improvement project, was absent from the project or was not making progress on the project; and (3) the Bergers paid for Schroeder's work even though they were very dissatisfied.⁷

¶13 Whether to admit testimony about Christina's health issues was within the circuit court's discretion. *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. Discretionary decisions are characterized by a logical rationale based on the facts and the law. *Hughes*, 197 Wis. 2d at 987. The circuit court had a rational basis for admitting the Bergers' testimony about Christina's health issues. The testimony was relevant and placed the Bergers' testimony about the home improvement work in context.

¶14 Schroeder next complains that during motions after the verdict, the Bergers referred to their inability to settle the case. An affidavit of counsel in support of the Bergers' request for attorney's fees⁸ also informed the court of some aspects of the parties' court-ordered mediation. Schroeder argues that the Bergers violated WIS. STAT. § 904.08 (evidence of settlement negotiations is not admissible) and § 904.085(3) (evidence of communications in mediation generally not admissible).

⁷ Christina Berger testified that given the problems with the home improvement work and her health issues, she agreed to pay Schroeder in the hope that the problems associated with the home improvement work would just "go away."

⁸ This is the only part of the record to which Schroeder cites for this claim. We restrict our review of this issue to that portion of the record as we will not search the record for other instances, if any.

¶15 WISCONSIN STAT. § 904.08 permits reference to settlement activities when the evidence is offered for a purpose unrelated to proving liability or the amount of a claim. *Id.* Schroeder does not cite any authority excluding evidence of settlement activity (or lack thereof) as part of a claim for attorney's fees. The Bergers' counsel's affidavit in support of fees properly referred to fees arising from an inability to settle the case. We also see no error in informing the court, in connection with an attorney's fees claim, that the parties participated in one day of mediation and no settlement proposals were made during mediation, which necessitated more legal work by the Bergers' counsel.

¶16 Schroeder next argues that the judgment should not have been entered against Thomas Robert Schroeder individually. At the hearing on motions after the verdict, Schroeder argued that if judgment was going to be entered, the judgment should be for \$2000 (\$1000 in compensatory damages found by the jury, doubled pursuant to the applicable home improvement statute). Schroeder did not argue that a judgment should not be entered against Thomas, nor did Schroeder seek relief from the verdict for Thomas or dismissal of Thomas from the case. Any argument that judgment should not have been entered against Thomas was not raised with sufficient clarity to obtain a ruling from the circuit court. A litigant is not well positioned to argue that the circuit court erred if the litigant did not make the case to the circuit court. *Laribee v. Laribee*, 138 Wis. 2d 46, 51, 405 N.W.2d 679 (Ct. App. 1987). This issue is essentially raised for the first time on appeal, and we will not decide it. *Segall*, 114 Wis. 2d at 489.

¶17 Finally, Schroeder argues that the circuit court should have permitted its subcontractor witnesses to testify. At a motion in limine, the court barred these witnesses because Schroeder did not comply with the scheduling order that required identification of these witnesses by name and a brief statement of their testimony.

Schroeder conceded that it did not comply with the scheduling order but argued that its pretrial report, which it filed the day after discovery closed pursuant to the scheduling order, provided sufficient information to the Bergers and effectively conveyed the information required by the scheduling order. The pretrial report named six subcontractors, but the report did not contain “a brief statement as to his/her testimony” as required by the July 1, 2013 scheduling order. The court found that Schroeder’s failure to comply with the scheduling order was not excusable, the Bergers would be prejudiced by permitting testimony from the subcontractor witnesses who were not identified as required by the scheduling order, and allowing the subcontractors to testify would subvert the purpose of the scheduling order. The court excluded the untimely named subcontractor witnesses from trial.

¶18 “Litigants are expected to follow circuit court scheduling orders.” *Hefty v. Strickhouser*, 2008 WI 96, ¶76, 312 Wis. 2d 530, 752 N.W.2d 820. Sanctions for failure to comply with a scheduling order are within the circuit court’s broad discretion. *Id.* Those sanctions include barring the testimony of a witness if a party is prejudiced by opposing counsel’s failure to identify that witness. *Milwaukee Rescue Mission, Inc. v. Redevelopment Auth.*, 161 Wis. 2d 472, 490, 468 N.W.2d 663 (1991).

¶19 Schroeder does not persuade us that the circuit court erroneously exercised its discretion when it excluded Schroeder’s subcontractor witnesses. The pretrial report that Schroeder claims disclosed its witnesses did not comply with the scheduling order. The court stated reasons for excluding Schroeder’s subcontractor witnesses, and its decision is supported by the facts of record and the law.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5. (2013-14).

